[redacted]

[redacted]

Appellant

v.

STATE OF MARYLAND

[redacted]

Appellee

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Counsel for Appellant

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 160

MILLER BROTHERS COMPANY,
Appellant,

vs.

STATE OF MARYLAND

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, as amended, appellant submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment and order of the Court of Appeals of Maryland entered in this case.

Opinion Below

The opinion of the Court of Appeals of Maryland has not been officially reported. It may be found in 95 A. 2d 286. The opinion of the Superior Court of Baltimore City has not been reported. Copies of both opinions are attached hereto as Appendix A.

Jurisdiction

The judgment and order of the Court of Appeals of Maryland were entered on March 11, 1953. (R. 129) A peti-

tion for appeal is being presented to the Chief Judge of that court, to wit, on June 4, 1953. The jurisdiction of the Supreme Court to review the judgment and order on appeal is conferred by Title 28, United States Code, Section 1257 (2), 62 Stat. 929.

On March 19, 1952, the State of Maryland (appellee here and in the Court of Appeals of Maryland) filed an attachment proceeding in the Superior Court of Baltimore City alleging that appellant was indebted to it by reason of its "failure and refusal to pay legally assessed deficiencies to the said State of Maryland, in Use Taxes justly due and owing, in the full and just sum of Three Hundred Fifty-six dollars and Forty cents ($356.40)". (R. 9) The court thereupon issued a writ of attachment directing the Sheriff of Baltimore City to attach any property of appellant which could be found in the jurisdiction. (R. 14-15) The Sheriff's return on this writ shows that on April 4, 1952, he seized a station wagon bearing Delaware License No. C 4749 which he appraised at a value of $800. (R. 15-16)

On March 19, 1952, the same day the attachment proceeding was filed, and in connection with the attachment proceeding, the State of Maryland filed a suit (called in Maryland parlance "the short note case") against appellant in the Superior Court of Baltimore City, Maryland, to recover taxes, interest and penalty alleged to be due in the amount of $356.40. (R. 10-11) The Sheriff of Baltimore City was directed to summon the appellant to appear on a day named in the writ of summons. (R. 13) The Sheriff's return on the writ of summons shows that the appellant was not found within the jurisdiction of that court. (R. 13)

Thereafter appellant appeared specially in the attachment proceeding solely for the purpose of protecting its interest in the property attached and petitioned the court to quash the writ of attachment for the following reasons:

"(a) The use tax which the Plaintiff claims is due and owing by the Defendant to the Plaintiff consists of use taxes which Plaintiff claims the Defendant was required, by the Maryland Use Tax Law [Sections 308 to 337[1] inclusive of Article 81 of the Annotated Code of Maryland, 1947 Cumulative Supplement (as amended)] to collect and pay to the Plaintiff on sales of certain tangible personal property made by the Defendant in the State of Delaware to Maryland purchasers. The Defendant has not engaged nor does it engage in any local activities in the State of Maryland which could be the basis for such a requirement. If the Maryland Use Tax Law be construed to require the Defendant to make said collections and payments, said Law is void because it violates (i) the due process clause of the Fourteenth Amendment to the Constitution of the United States of America, (ii) Article 23 of the Declaration of Rights of the Constitution of Maryland, and (iii) Section 8 (Commerce Clause) of Article I of the Constitution of the United States of America.

"(b) That the Maryland Use Tax Law cannot properly be construed to require the Defendant to make said collections and payments."

The State of Maryland then moved to dismiss appellant's petition on the grounds (1) that collection of sales and use taxes could be contested only by following certain administrative and court proceedings prescribed by the sales and use tax laws, and (2) that the assessment, collection and payment of the tax involved were authorized and required by Sections 368 through 396, inclusive, of Article 81 of the Annotated Code of Maryland and such authorization and requirement did not violate any provisions of the Consti-

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[1] NOTE: These sections were renumbered as section 368-396, inclusive, in the 1951 Edition of the Annotated Code of Maryland, which was published after the trial of this case in the Superior Court of Baltimore City but before the case was heard on appeal in the Court of Appeals of Maryland. Except as specifically noted, the numbering of the 1951 Edition will be used throughout this Statement.

tution of the United States of America or the Constitution of the State of Maryland. (R. 21-22)

Pursuant to a stipulation (R. 29) signed by counsel for both appellant and the State of Maryland, appellant's petition was considered as having been refiled as a plea in bar in the short note case by appellant appearing specially and solely for the purpose of defending its interest in the property attached (R. 29), and the case then proceeded to hearing on the issues raised by the State's request for dismissal of the petition to quash the writ of attachment and by its request for judgment against the appellant in the short note case and for a final judgment of condemnation against the station wagon attached, and by the appellant's petition to quash the writ of attachment and its plea in bar which made the same contentions as the petition. These contentions are summarized above and will not be restated.

An agreed statement of facts was presented to the court from which it appeared that the taxes which the State was seeking to collect from appellant arose out of sales of goods in Delaware to customers who lived in Maryland. It further appeared that in the case of some of these sales delivery was completed in the State of Delaware; in others the goods sold were delivered by common carrier to the customers at their residences in Maryland; in still others the goods sold were delivered to the customers at their residences in Maryland by trucks owned and operated by the appellant, such deliveries being made directly from the appellant's store in Wilmington, Delaware, to the residence of the Maryland purchaser. (R. 23, 25, 26)

After hearing argument the court denied appellant's petition to quash the writ of attachment and signed an order entering judgment against the appellant in the short note case for $363.00 with interest and costs, this being the full amount of the tax alleged to be due in connection with all

of the transactions described in the agreed statement of facts. (R. 32, 55, 51)

In his opinion, the trial judge (WARNKEN, J.) held (1) that the appellant had the right to defend this suit by raising the constitutional questions stated in its petition to quash the attachment above mentioned and overruled the contention of the State that the appellant should first have resorted to administrative remedies (R. 38); (2) that the appellant was engaged in business in the State of Maryland and could be required to collect and be made liable to the State of Maryland for the use tax on tangible personal property which it delivered in Maryland by its own trucks or by common carrier (R. 48); (3) that the State of Maryland had "no jurisdiction" to require appellant to collect or be liable for the use tax on tangible personal property purchased by Maryland residents in Delaware and personally brought by such residents into Maryland (R. 48); and (4) that since the tax was valid as to some transactions, the Comptroller of the State of Maryland had the legal right to make a deficiency assessment against it and the amount of the assessment could be attacked only by pursuing the administrative and court proceedings made available by the Maryland statutes. (R. 49) Accordingly, the assessment against the appellant on all sales was upheld, (R. 49, 50).

Appellant filed two appeals in the Court of Appeals of Maryland. One appeal was from the order of the court denying appellant's petition to quash and set aside the writ of attachment. (R. 57) The other appeal was from the judgment entered against appellant in the short note case. (R. 56)

The Court of Appeals affirmed both the judgment and the order by a final order entered on March 11, 1953. In its opinion, the court dealt first with the contention of the

State that appellant, by failing to follow the statutory administrative procedure, lost all right to attack the assessment. This contention was overruled, the court holding that the statutory procedures were inapplicable. In this connection the court said: (R. 122)

> "As appellant has not been regularly conducting its business in any County of the State or in Baltimore City, within the meaning of Section 348, it could not have followed the statutory procedure. Therefore, appellant was not precluded from challenging the validity of the assessment in the attachment case."

The Court of Appeals also held that appellant had the right to appear specially in such an attachment proceeding solely for the purpose of protecting its interest in the property attached and without subjecting itself personally to the jurisdiction of the court even though in order to protect its property it contested the validity of the State's claim. (R. 128)

The Court of Appeals also dealt with appellant's contention that it was not subject to those provisions of the Maryland statute which imposed upon vendors the burden of collecting use taxes and the liability to account therefor. The court held that while the appellant had not been "regularly conducting its business in any county of the State or in Baltimore City" and was not doing business in the State "within the meaning of the Foreign Corporation Law so as to subject itself to the State forum", it was nevertheless "engaged in business in this State" within the meaning of the Maryland Use Tax Law. (R. 123).

The court then held that the assessment of the tax against appellant did not infringe Article I, Section 8, of the Constitution of the United States vesting in Congress the power to regulate commerce with foreign nations and among the several states nor violate the Due Process Clause of the

Fourteenth Amendment of the Federal Constitution nor Article 23 of the Maryland Declaration of Rights which declares that no man ought to be deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the Land." Finding that there was no valid objection to the assessment, the court affirmed the judgment entered in the short note case in favor of the State and also the order in the attachment case denying appellant's petition to quash the attachment. (R. 129).

In affirming the judgment the Court of Appeals necessarily held (contrary to the opinion of the trial court) that the State could validly assess against appellant use taxes payable by Maryland customers who bought goods from the appellant in Delaware, took delivery there and thereafter themselves brought the goods into the State of Maryland. In the trial court the assessment had been held invalid to the extent that such cases were included but judgment had been entered against the appellant nevertheless because of failure to pursue appropriate administrative remedies. The Court of Appeals did not base its affirmance on this ground—in fact it specifically held that the administrative remedies were not available to the appellant—but rather on the ground that the assessment was in all respects valid and lawful.

All the requirements of Section 1257 (2) of Title 28 of the United States Code, 62 Stat. 929, have thus been met. The appellant by its pleadings filed in the trial court, by its counsel's oral argument in the trial court and memorandum of law filed therein, and by its appeal papers and brief filed in the Court of Appeals of Maryland and oral argument of its counsel therein, in each and every instance, drew in question the validity of a statute of the State of Maryland on the ground of its being repugnant to the Constitution of the United States, as applied to sales made by appellant.

The trial court considered this contention on its merits and held the statute valid in its application to two classes of transactions and invalid as applied to another. On appeal the Court of Appeals decided in favor of the validity of the statute in its application to all sales made by appellant to its Maryland customers. This was a final judgment rendered by the highest court of the State of Maryland in which a decision could be had. The jurisdiction of this Court on appeal is therefore clear. *Dahnke Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921).

Question Presented

This appeal presents the question whether a Delaware merchant can be held liable to pay a use tax on goods sold in Delaware to residents of Maryland for use in Maryland, where the merchant's only contacts with Maryland are in the occasional use of the mails to transmit advertising matter to its regular customers and in the use of Maryland highways to deliver to some of its Maryland customers articles sold to them in Delaware.

Statutes Involved

The claim asserted by the State against the appellant is based upon the Maryland Use Tax Act (Chapter 681 of the Acts of 1947, as amended.) This statute has been codified as Sections 368-396, inclusive, of Article 81 of the Annotated Code of Maryland, 1951 Edition. It incorporates by reference a number of the provisions of the Retail Sales Tax Act (Chapter 281 of the Acts of 1947, as amended) which has been codified as sections 320-367, inclusive, of Article 81 of the Annotated Code of Maryland, 1951 Edition. The provisions of the statutes pertinent to this appeal are set forth in Appendix B hereto.

Statement of the Case

Appellant, Miller Brothers Company, is a Delaware corporation. It has never qualified or registered to do business in Maryland and has no resident agent in that state. It is engaged in the retail household furniture business. It has only one store, which is located in Wilmington, Delaware. It does not maintain any office, branch store, warehouse or other place of business in Maryland. It has no salesman or other employee in Maryland.

Appellant distributes, by an automatic card mailing system, about four pieces of advertising matter a year. By the very nature of such automatic mailing, these are mailed to everyone who has purchased from appellant and whose name and address are on appellant's records. Although Maryland residents do receive such mailing pieces, no advertising copy is mailed for the specific purpose of attracting Maryland buyers. Appellant has not sent any advertising copy to Maryland buyers alone, and the only advertising copy which these Maryland buyers receive is that which is sent to all customers whose names and addresses are on the records of appellant.

Most of the merchandise sold by appellant requires personal inspection and selection. Appellant maintains no mail-order business and does not accept orders by telephone. In all cases the purchaser (whether a Maryland or a Delaware resident) goes to appellant's store in Wilmington, Delaware, and there selects the items which he desires to purchase. Deliveries to Maryland purchasers are made in one of the following three ways and no other:

(1) The article is taken away by the purchaser.

(2) Appellant delivers the article in Wilmington, Delaware, to a common carrier which delivers the article in Maryland to the purchaser. The cost of delivery is borne solely by appellant.

(3) The article is delivered in Maryland to the purchaser, in a motor vehicle owned and operated by appellant, directly from appellant's store, storeroom or warehouse in Wilmington, Delaware, to the residence of the Maryland purchaser. The cost of delivery is borne solely by appellant.

On or about March 10, 1952, the Comptroller of the State of Maryland assessed a deficiency in use tax against appellant in the amount of $356.40. This assessment included use taxes alleged to be due on all sales made by appellant to its Maryland customers during the period July 1, 1947, through December 31, 1951, together with interest and penalty. Sales in which the purchaser took delivery in Delaware were included among those on which the use tax was claimed. Also included were sales where delivery was made in Maryland by common carrier or in appellant's own trucks.

Appellant, through its counsel, having advised the Comptroller that the Company intended to ignore the assessment, the State of Maryland instituted attachment proceedings in the Superior Court of Baltimore City. A full description has already been given of these proceedings leading to the final judgment of the Court of Appeals of Maryland upholding the validity of the assessment in all respects.

The Question Is Substantial

The tax involved in this case is imposed under the authority of a Maryland statute which purports to tax the use in Maryland of articles purchased outside the state. The assessment against appellant which has been upheld by the Court of Appeals of Maryland included taxes on the use of articles sold to Maryland purchasers who actually took delivery at appellant's Delaware store as well as on the use of articles which were delivered to Maryland purchasers

either by common carrier or by trucks owned and operated by appellant.

1. The ruling of the Court of Appeals of Maryland goes beyond any case previously decided by this or any other court and represents a novel extension of the power of a state to impose burdens on those who do business beyond its territorial limits.

The cases relied upon by the Court of Appeals are all readily distinguishable. *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U.S. 62 (1939) upheld a California statute requiring retailers who maintained a place of business in the state to collect and pay to the state a use tax on all goods sold to residents of the state. In that case it appeared that the vendor was doing business in California on an extensive scale. It employed California agents who devoted their full time to soliciting business. It leased offices in its own name in California and paid the rent therefor. The statement in the opinion of the Court of Appeals of Maryland in the present case that the vendor in the *Gallagher* case "did not carry on any intrastate operations in California and was not subject to its jurisdiction" is therefore manifestly erroneous.

In *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167 (1939) the Southern Pacific Company, which operated a railroad in the State of California, sought to enjoin the collection from it of the California use tax on tangible personal property purchased by it outside of the state and installed on importation or kept available for use as a part of its transportation facilities. Plainly, the decision in that case has no relevance to the issues presented by the present appeal.

Nelson v. *Sears Roebuck & Co.*, 312 U. S. 359 (1941), upheld the right of Iowa to collect from the vendor a use tax on mail-order business conducted directly between customers in Iowa and the vendor's mail-order houses located outside the state. In that case the vendor was a New York

corporation authorized to do business in Iowa which maintained various retail stores there. A majority of the Court over the protest of Mr. Justice ROBERTS and Chief Justice HUGHES held that since Iowa had extended to the vendor the privilege of doing business through its retail stores in that state, Iowa could exact the burden of collecting the use tax on mail-order business "as a price of enjoying the full benefits flowing from its Iowa business."

Nelson v. *Montgomery Ward & Co.*, 312 U. S. 373 (1941), reached the same result on substantially identical facts. However, the Court called attention to the fact that the retail stores of Montgomery Ward & Co. had printed advertisements in the state of Iowa advertising not only retail merchandise but the ability to complete service through the use of the mail-order catalogue as well. This solicitation "through local advertisements" was held to be substantially equivalent to the solicitation "directly by local agents as in *Felt & T. Mfg. Co.* v. *Gallagher*, 306 U. S. 62".

In both the *Nelson* cases the vendor sought to be taxed was qualified to do business in the taxing state and carried on a substantial volume of business there. Mr. Justice DOUGLAS speaking for the court emphasized this as the controlling fact and clearly implied that Iowa would otherwise be impotent to reach the vendors. (See 312 U. S. at p. 364.)

In *General Trading Co.* v. *State Tax Commission of Iowa*, 322 U. S. 335 (1944), the State Tax Commission of Iowa brought suit against a Minnesota corporation to recover use taxes on goods shipped by common carriers or the post from Minnesota to residents of Iowa. The vendor appeared voluntarily to the action and assailed the validity of the Iowa statute as applied to it. It appeared that traveling salesmen employed by the vendor had solicited the orders in Iowa but that the vendor maintained no office, branch or warehouse in that state. This Court upheld the right of Iowa to collect the tax from the Minnesota vendor, over the vigorous dis-

sent of Mr. Justice JACKSON and Mr. Justice ROBERTS. Mr. Justice RUTLEDGE, concurring, pointed out that the evidence in that case warranted the conclusion that the Minnesota vendor had been engaged in "continuous, regular, and not intermittent or casual courses of solicitation". See 322 U. S. at p. 354.

In striking contrast to the cases cited by the Court of Appeals, the present record shows that appellant has engaged in no activities in the State of Maryland except the use of the mails to transmit advertising material and use of the highways to deliver merchandise. We find no decision of this or any other court that holds that jurisdiction to tax can be based on any such tenuous thread.

In the courts below, the State argued that the Maryland statute did not impose a tax on appellant but merely the duty to collect a tax. It is submitted that this is a mere play on words. It is true that the tax is one which appellant can lawfully pass on to its customers and that the customer is the person primarily liable. The fact remains, however, that the claim of the State upheld in the courts below, is to collect a tax from appellant. As the declaration of the State in the short note case shows, "the Comptroller has assessed a deficiency in use tax" against this appellant. If this is not a tax, then one wonders what term could be used to describe it.

2. The ruling of the Court of Appeals creates an incongruous practical situation which will have important consequences in confusing interstate business. If upheld, it will extend the power of the Comptroller of the State of Maryland beyond the powers of the courts of that state. The appellant is not subject to suit in Maryland and has declined to submit itself to the jurisdiction of the Maryland courts. It has ignored the attempt of the State to tax it and when its personal property was seized by attachment, it appeared in the Maryland courts solely for the purpose of defending its

interest in the property attached. The Court of Appeals of Maryland has recognized the fact that appellant is beyond the reach of the Maryland courts and that no personal judgment can be entered against it. The following quotation from the opinion of the Court of Appeals speaks for itself:

> "In such a case the court has jurisdiction over the property attached, but does not have jurisdiction over the person of the defendant. In support of this rule, the American Law Institute states: 'If the court thereby acquires jurisdiction over him personally, in spite of his protestation that he does not intend to submit himself personally to the jurisdiction of the court, he has been placed in a difficult dilemma. He has been compelled either to lose his property, even though the claim against him is unfounded, or to submit himself personally to the jurisdiction of the court which otherwise could have no power over him.' Restatement, Judgments, sec. 40.
>
> "But even acknowledging that appellant, a foreign corporation, was not subject to the State's jurisdiction, we hold that appellant may be held liable for the collection of the use tax from its Maryland customers."

The attempt of the State of Maryland to collect the Maryland use tax from those situated as is the appellant falls afoul of territorial limitations. Obviously the provisons of the statute which purport to give the Comptroller of the State the power to examine appellant's books are wholly nugatory. The Comptroller of Maryland cannot reach into Delaware any more than can the courts of that State. The only avenue open to the State to exercise the powers which the Court of Appeals has now conferred upon it is to make arbitrary assessments and then to seize vehicles engaged in interstate movement, a dramatic illustration of the fundamental vice in the rulings below. Cf. *Buck* v. *Kuykendall*, 267 U.S. 307 (1925).

3. The decision of the Court of Appeals is not only novel and important but is also erroneous. To hold that a vendor

is required to pay a use tax because of contacts with the taxing state, which are insufficient to give the courts of that state jurisdiction to enforce the tax, is to fly directly in the teeth of the Fourteenth Amendment. Cases such as *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945) make it clear that the power of the courts of the state to extend their jurisdiction over foreign corporations is limited by considerations substantially identical with those which limit the power to tax. Compare *McLeod* v. *Dilworth*, 322 U.S. 327 (1944).

Even more plain is the conflict between the ruling of the Court of Appeals and the Commerce Clause of the Federal Constitution. If the State of Maryland can make appellant liable for this tax merely because it uses the mails or the highways of the State to make deliveries to its customers, then indeed the freedom of movement across state borders, which ever since *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824) has been recognized as the great object of the Commerce Clause, is at an end. We know from recent decisions of this Court that the states may not exact a tax for the privilege of doing interstate business nor levy a tax upon some local event so much a part of interstate business as to be in effect a tax upon the interstate business itself. *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80, 88-89 (1948); *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 608-609 (1951). Particularly offensive is any attempt of the states to exercise their regulatory power so as to protect the local economy from the effect of interstate commerce. *Buck* v. *Kuykendall*, 267 U.S. 307 (1925) and *Bush* v. *Maloy*, 267 U.S. 317 (1925), struck down attempts of the states to exclude interstate motor carriers in order to limit competition. *Baldwin* v. *Seelig*, 294 U.S. 511 (1935), condemned legislation prohibiting the sale within the state of milk brought into the state and bottled there for which less than a minimum price had been paid to the producer in another state. *Hood* v. *Dumond*, 336 U.S.

525 (1949), set aside a law which the state courts had construed to authorize denial of a permit to a corporation engaged in distributing milk across state lines to build a new milk receiving station, the purpose of the denial being to protect other local distributors from destructive competition and to insure a needed supply to the local market.

In dealing with this question, the Court of Appeals of Maryland relied upon cases such as *Henneford* v. *Silas Mason Co.*, 300 U.S. 577 (1937) and *McGoldrick* v. *Berwind White Coal Min. Co.*, 309 U.S. 33 (1940). But in those cases the taxes upheld were imposed upon those who used or sold property within the borders of the taxing state. Here, whatever may be pretended to the contrary, the tax is imposed not on the user but upon the non-resident vendor. The truly significant part of the *Henneford* decision is the caution of Mr. Justice Cardozo that "a tax upon a use so closely connected with delivery as to be in substance a part thereof, might be subject to the same objections that would be applicable to a tax upon the sale itself." See 300 U.S. at p. 583. *McLeod* v. *Dilworth*, 322 U.S. 327 (1944) makes it plain that any attempt on the part of the State of Maryland to tax the sales involved in the present case would fall afoul of the Federal Constitution.

Thus it appears that the ruling of the Court of Appeals of Maryland decides a question of constitutional law which is new and which is important, in a manner which appears to be in conflict with the doctrines pronounced in prior decisions of this Court. It follows that the questions presented are substantial and of public importance.

Respectfully submitted,

JAMES PIPER,
WILLIAM L. MARBURY,
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JAMES L. LATCHUM,
Counsel for Appellant.

APPENDIX "A"

I

[Opinion of Judge Warnken in the Superior Court of Baltimore City]

Opinion

(Filed August 11, 1952)

This is an attachment proceeding by the State of Maryland to collect from Miller Brothers Company, a corporation, use taxes imposed by the Maryland Retail Sales and Use Tax Act, sections 259 to 336, inclusive, of Article 81 of the Annotated Code of Maryland (1947 Supp.), hereinafter referred to as the Act, in the amount of $356.40, which includes interest and penalty. The tax is an excise tax "levied and imposed on the use, storage or consumption in this State of tangible personal property purchased from a vendor within or without this State for use, storage or consumption within this State." The tax is required to be paid by the purchaser. It is at the rate of two cents per dollar of the sale price (§ 309). Section 311 requires the vendor to collect the tax from the purchaser, and by Section 315 the vendor is made personally liable to the State for the amount uncollected.

The proceeding was filed under Section 156 of Article 81 of the Code, which gives the State the right to resort to attachment, whether the defendant be a resident or non-resident of the State. A station wagon of the defendant was seized by the Sheriff and appraised in this proceeding at $800.

Defendant filed a motion to quash the attachment on the ground that, if the Maryland Use Tax Law be construed to require the defendant to make the collections mentioned, the law is void because it violates (1) the due process clause of the Fourteenth Amendment of the Constitution of the United States, (2) Article 23 of the Declaration of Rights of the Constitution of Maryland, and (3) Section 8 (Commerce Clause) of Article 1 of the Constitution of the United States. The State contends that the grounds to

quash relate to the merits of the claim and not to a defect in the papers or procedure or the right to maintain the attachment, if the claim is valid. The case was heard on an agreed statement of facts and it was also agreed that if the motion to quash is denied the reasons given therein shall be considered as a plea in bar to the short note case. As defendant desires the substantive questions determined, the motion to quash will be denied and the short note case determined.

The agreed facts, substantially as summarized by defendant, are as follows. The period involved is July 1, 1947 to December 31, 1951. The Company (defendant) is a Delaware corporation. It has only one store, a retail household furniture store in Wilmington, Delaware. In addition to its Delaware customers, the Company has made, during said period, and does make certain sales of tangible personal property to residents of Maryland, who have used, consumed or stored such purchased personal property in Maryland. The customers appear at such store in Wilmington, Delaware, and select the items of furniture which they wish to purchase. Some of the items sold are the very items selected by the customers, and some are identical to those selected but are delivered from the Company's storeroom or warehouse in Wilmington, Delaware. Deliveries to Maryland purchasers are made in one of the following three ways and no other:

(1) The article is taken away by the purchaser. During said period tangible personal property sold for at least $2500 was so delivered.

(2) The Company delivers the article in Wilmington, Delaware, to a common carrier which delivers the article in Maryland to the purchaser. The cost of delivery is borne solely by the Company. During said period tangible personal property sold for at least $1500 was so delivered.

(3) The article is delivered in Maryland to the purchaser, in a motor vehicle owned and operated by the Company, directly from the Company's store in Wilmington, Delaware, to the residence of the Maryland purchaser. The cost of delivery is borne solely by the Company. During said period tangible personal property sold for at least $8000 was so delivered.

Payment for some purchases is completed at the time the purchaser appears at the Company's retail store and prior to the delivery. Other sales are made on credit including some sales made to customers who reside in Maryland. In some such cases, including some sales to Maryland customers, the Company enteres in to conditional sales contracts and in others the terms of the credit transactions are simply noted on a sales slip, in which case the transaction is frequently designated as a sixty or ninety-day charge account.

The Company employs no solicitors or salesmen who operate in the State of Maryland. It has from time to time mailed advertising matter to its customers whose names and addresses are on its records, including those who reside in Maryland, it has advertised regularly in newspapers published in Wilmington, Delaware, which have some circulation in some parts of Maryland, and it has broadcast programs containing radio or television advertising over stations located in Wilmington, Delaware, and these programs could have been received within the State of Maryland. No special solicitation has ever been directed to Maryland residents. The Company has never qualified or registered to do business in the State of Maryland nor has it any assets physically located in this State. The station wagon attached in this particular case is used by the Company in making deliveries to its customers.

Most of the pertinent sections of the law are as follows:

> 311. Every vendor engaging in business in this State and making sales of tangible personal property for use, storage or consumption in this State, which are taxable under the provisions of this sub-title, at the time of making such sales, or if the use, storage or consumption is not then taxable hereunder, at the time when such use, storage or consumption becomes taxable hereunder, shall collect the tax imposed by this sub-title from the purchaser.
>
> 308(k). "Engaged in business in this State" means the selling or delivering in this State, or any activity in this State in connection with the selling or delivering in this State, of tangible personal property for use,

storage or consumption within this State. This term shall include, but shall not be limited to the following acts or methods of transacting business.

(1) The maintaining, occupying or using, permanently or temporarily, directly or indirectly, or through a subsidiary or agent, by whatever name called, of any office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business.

(2) The having of any representative, agent, salesman, canvasser, or solicitor operating in this State for the purpose of selling, delivering, or the taking of orders for any tangible personal property.

313. Every vendor required or permitted to collect the tax shall collect the tax imposed by the provision of this sub-title, notwithstanding the following:

(a) That the purchaser's order or the contract of sale is delivered, mailed, or otherwise transmitted by the purchaser to the vendor at a point outside of this State as a result of solicitation by the vendor through the medium of a catalog or other written advertisement; or

(b) That the purchaser's order or contract of sale made or closed by acceptance or approval outside of this State or before said tangible personal property enters this State; or

(c) That the purchaser's order or contract of sale provides that said property shall be, or it is in fact, procured or manufactured at a point outside of this State and shipped directly to the purchaser from the point of origin; or

(d) That said property is mailed to the purchaser in this State from a point outside this State or delivered to a carrier at a point outside this State, F.O.B., or otherwise, and directed to the vendor in this State, regardless of whether the cost of transportation is paid by the vendor or by the purchaser; or

(e) That said property is delivered directly to the

purchaser at a point outside this State, if it is intended to be brought to this State for use, storage or consumption in this State.

324. The vendor or person subject to tax as provided in this sub-title shall be entitled to apply and credit against the amount of tax payable by him as stated in Section 323, an amount equal to three per cent (3%) of the gross tax to be remitted to the Comptroller to cover the expense in the collection and remittance of said tax; provided, however, that nothing contained in this section shall apply to any vendor or person who shall fail or refuse to file his return with the Comptroller within the time prescribed by Sections 320 and 322 of this sub-title.

The defendant makes two principal contentions, (1) that as a matter of construction the Act is not applicable to it because it is not "engaging in business in this State" and (2) if the Act is construed to apply to it because it is "engaging in business in this State" then the Act is invalid because it violates the Federal and Maryland Constitutions in the respects above mentioned.

Before these questions are determined it is necessary to consider the contention of the State that the defenses set up by the defendant can not be considered in this proceeding because the defendant has not followed the procedure set forth in the Act to have its liability and the amount thereof reviewed by the Comptroller, and, if dissatisfied, by the appropriate court and eventually the Court of Appeals.

The State relies on Sections 286, 287 and 288 of Article 81, which were enacted as part of the Act. Section 287 provides that "any taxpayer may apply to the Comptroller for revision of the tax assessed against him", who is then required to take such action as he deems just and notify the taxpayer of the action taken. The latter may within a specified time request a formal hearing before the Comptroller. After the hearing the Comptroller is required to make a determination and notify the taxpayer. Section 288 provides that the taxpayer, if dissatisfied with the determina-

tion of the Comptroller, may, within a time specified, appeal "to the Circuit Court for the County in which the taxpayer regularly conducts his business, or to the Baltimore City Court if the taxpayer regularly conducts his business in Baltimore City. Such appeal shall be limited to questions of law only. * * *." If the taxpayer or the State is dissatisfied with the determination of the Court either may appeal to the Court of Appeals of Maryland.

Section 286 is as follows:

> "No injunction or writ of mandamus or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or any officer or employee thereof to prevent or enjoin the collection under this sub-title of any tax sought to be collected, and no suit or proceeding shall be maintained in any court by any taxpayer for the recovery of any amount of taxes alleged to have been erroneously or illegally assessed or collected except as is provided by Sections 287-288, inclusive, of this sub-title."

With respect to the latter section defendant's position is that it has no relation to the present proceeding, because this is not a suit, action or proceeding against the State of Maryland or any officer or employee thereof, nor is any injunction or writ of mandamus or other legal or equitable process sought against the State or any officer or employee thereof; and that this is not a suit or proceeding by a taxpayer for the recovery of taxes alleged to have been erroneously or illegally collected. That in this case defendant is seeking merely to defend its property.

Defendant also contends that Sections 287 and 288 are based on the assumption that defendant was engaged in the regular conduct of business in Baltimore City or in one of the counties and that such is not legally correct. Therefore, in order to invoke the right of appeal to the courts under Section 288, defendant would have been compelled to make a concession which would not only be contrary to fact but which would be highly prejudicial to its entire case, since it claimed the invalidity of the State's imposition of the tax on defendant arises out of the very fact

that defendant is not conducting its business within Maryland. Therefore an application to the Comptroller would be sterile because defendant would have no means of court review as it does not regularly conduct its business in any of the subdivisions of the State.

Defendant refers to *Schneider v. Pullen,* 81 A. 2d 226 (1951) in which the Court sustained the right of a person conducting a trade school to seek a declaratory decree as to the invalidity of a statute and regulations thereunder, requiring private trade schools to obtain certificates from the State Superintendent of Schools. The Court held "that where a special form of remedy is provided, the litigant must adopt that form and must not bypass the administrative body or official by pursuing other remedies." But it was held "that where constitutional questions are involved, the litigant has the right to raise them", the Court "has the right to consider them", and "the legislature cannot interfere with the judicial process by depriving litigants from raising questions involving their fundamental rights in any appropriate judicial manner, nor can it deprive the courts of the right to decide such questions in an appropriate proceeding."

The State insists that the last mentioned case involved complete invalidity of the statute as to everyone and not its inapplicability to particular persons. After consideration of the arguments of the parties and the cases cited by them on this point, I conclude that defendant has the right to defend this suit by raising the constitutional questions above mentioned. Section 286 is not applicable; defendant is not taking the initiative but is merely defending its property. Sections 287 and 288 seem to relate to persons who, admitting they are subject to the Act, dispute the correctness of the proposed assessment. In any event said sections do not prevent a person resisting on constitutional grounds an asserted claim of liability against him.

The defenses to the claim will now be considered.

1. Defendant advances a construction of the Act which would avoid deciding the constitutional questions which it has raised. The contention is that its activities in the State and in connection with sales of merchandise and deliveries

thereof to residents of the State do not constitute "engaging in business in this State" which is used in Section 311 and elsewhere in the Act. Reference is made to Section 308(k) which defines the meaning of "engaged in business in this State" as "the selling or delivering in this State, or any activity in this State in connection with the selling or delivering in this State, of tangible personal property for use, storage or consumption within this State." The section also states that the term should include, *but shall not be limited to*, the following acts or methods of transacting business. There are then set forth in two paragraphs certain "acts or methods of transacting business." Defendant says it is not engaged in any of such acts or methods. It is specifically stated in the Act that the meaning of the term quoted is not limited to the particular acts or methods of transacting business. It is also argued that provisions in other sections of the Act imply the maintenance of a place of business within this State.

In *General Trading Co. v. State Tax Commission of Iowa*, 322 U. S. 335, it appears from the opinion of the Supreme Court of Iowa, 233 Iowa 877, that a "retailer maintaining a place of business in this state" was required to collect the use tax on the sale price of property which it sold to a purchaser in Iowa. The Court in deciding the question raised here said:

> "The contention is that defendant is not a 'retailer maintaining a place of business in this state,' as defined by paragraph 6 of said section 6943.102. The answer asserts facts from which it appears that, if the phrase were to be given its ordinary meaning, defendant is not such a retailer. But we are dealing with a statutory definition. The Tax Commission points out that the statute provides that a 'retailer maintaining a place of business in this state' shall include 'any retailer having * * * within this state * * * any agent operating within this state under the authority of the retailer * * * irrespective of whether such * * * agent is located here permanently or temporarily, or whether such retailer * * * is admitted to do business within this state.' The language is sufficient to include defendant within the terms

of the statutory definition. We cannot shut our eyes to the words of the statute. The use of the words is the prerogative of the legislature. Our only function is to interpret the words which it has used. The trial court was right in holding that defendant's operations bring it within the letter and the language of the statute." (pp. 880-881).

The Supreme Court accepted the lower appellate court's finding (322 U.S. 335). In that case the vendor maintained no place of business and was not qualified or registered to do business in that state. It sent traveling salesmen from Minnesota into Iowa, none of whom lived in Iowa or had headquarters there. They solicited orders for merchandise in Iowa which orders were subject to acceptance or rejection at vendor's office in Minnesota. The salesmen were not authorized to make, and did not make, any contracts in Iowa. In filling such orders as were accepted merchandise was shipped from Minnesota into Iowa by delivery to common carriers, truck or rail, or by delivery to United States Postal Department; the purchasers paid all costs of transportation by carrier or parcel post.

I do not construe the phrase "engaged in business in this State" as meaning the same as doing business in the state in the sense of being suable there and subject to process on claims growing out of transactions in other states. The facts in the General Trading Company case and the case at bar are not importantly different. In that case the physical presence of employees or agents of the vendor in Iowa preceded the contract of purchase and consisted of solicitation. In the case at bar the solicitation was made by mail but the deliveries were made by defendant's agent or employee in its own truck or, at the expense of defendant, by common carrier. I, therefore, find that defendant is engaged in business in this state within the meaning of the Act.

2. It is contended by defendant that it is not doing business in Maryland in the sense that these words have always been understood by our Court of Appeals, and that there is grave doubt that the legislature could define the term in such a way as to include defendant without violation of Article 23 of the Declaration of Rights. The exact point

as expressed by defendant does not have to be resolved. In the first place there is nothing in the Act to indicate that the legislature in using the expression "engaged in business in this State" had reference to the much older expression "doing business in this State." The two phrases have different connotations, depending upon the context in which they are used and the subject matter. Doing business in the State so as to be subject to the local jurisdiction for the purpose of service of process and suit in the State (*M. J. Grove Lime Co. v. Wolfenden*, 171 Md. 299), is essentially different from engaging in business for the purpose of collecting the use tax. Without further elaboration, I find no violation of Article 23 of the Maryland Declaration of Rights.

3. Sales taxes are not new. They have been the subject of judicial consideration, according to Mr. Justice Stone in *McGoldrick v. Berwind-White Co.*, 309 U.S. 33, 51 (1940), for more than seventy years. Their asserted invalidity is almost always based on the Commerce Clause and the Fourteenth Amendment. In recent years the necessity of finding new sources of revenue has caused more states to resort to a sales tax law and its complement, use tax law, and, in connection with the latter, to endeavor to require out of state vendors to collect from purchasers the tax on merchandise which the vendor delivers in the state. Many of the latter situations have been submitted for judicial determination as to their validity under the Federal Constitution. In such tests of constitutionality the boundary line is narrow. A situation in a particular case, which was thought to be the reason for the result, has been brushed aside as irrelevant or unimportant in later cases. This judicial process has greatly clarified a complicated but important subject matter. No useful purpose would be served in analyzing and discussing all of the numerous cases cited by counsel. A reference to some of the more recent cases should be sufficient.

The teaching of the cases is that considering the necessity of reconciling the competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed, it is only when state action amounts to an undue regulation or

burden that it violates the Commerce Clause. The subject of state power in relation to the Commerce Clause is very fully elaborated by Mr. Justice Stone in the McGoldrick case and most of the sales and related tax cases are cited and discussed. Rather full excerpts from the opinion of some of the basic and fundamental matters at this point of the discussion may be helpful.

That case involved a sales tax enacted by New York City of 2% of each sale, imposed on the purchaser, and required the seller to collect it for the City. "Sale" was defined as "any transfer of title or possession, or both * * * in any manner or by any means whatsoever for a consideration or any agreement thereof." Defendant, a Pennsylvania corporation, maintained a sales office in New York City. It mined coal in Pennsylvania and shipped by rail to dock in Jersey City and thence by barge to customers in New York City. All the sales contracts with the New York customers were entered into in New York City. In sustaining the validity of the law the Court said:

> "Section 8 of the Constitution declares that 'Congress shall have power * * * to regulate commerce with foreign Nations, and among the several States * * *.' In imposing taxes for state purposes a state is not exercising any power which the Constitution has conferred upon Congress. It is only when the tax operates to regulate commerce between the states or with foreign nations to an extent which infringes the authority conferred upon Congress, that the tax can be said to exceed constitutional limitations. See *Gibbons v. Ogden*, 9 Wheat 1, 187; *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 185. Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce, and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states."
>
> "But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of

their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, *Western Live Stock v. Bureau*, 303 U. S. 250, 254. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress."

After referring to a number of state taxes which had been upheld, the Court continued:

"In few of these cases could it be said with assurance that the local tax does not in some measure affect the commerce or increase the cost of doing it. But in them as in other instances of constitutional interpretation so as to insure the harmonious operation of powers reserved to the states with those conferred upon the national government, courts are called upon to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed.

* * *

It [New York tax] does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax on the 'use' of property which has just been moved in interstate commerce, sustained in *Monamotor Oil Co. v. Johnson*, 292 U. S.

86; *Henneford v. Silas Mason Co., supra; Felt & Tarrant Mfg. Co. v. Gallagher,* 306 U. S. 62; *Southern Pacific Co. v. Gallagher,* 306 U. S. 167."

In the colloquy between counsel and the Court at the hearing, counsel for defendant admitted that ultimately the constitutional defenses above mentioned depend upon a finding that the difference in the facts in the case at bar and the facts in the *General Trading Company* case require a different legal conclusion. After careful study of the numerous Supreme Court decisions, I regard the difference between the two cases as unimportant with respect to the constitutional questions involved. It would seem from the "group" of sales and use tax cases that there must be some activity on the part of the ex-state vendor in the state in which the purchaser resides in order to give the latter state jurisdiction over said vendor. It would also appear that in considering the constitutional defenses mentioned there is a difference between a sales tax *as such* imposed on the ex-state vendor and a use tax imposed on the purchaser, with respect to which the ex-state vendor is required to be the tax collector for the state imposing the tax. Compare *General Trading Co. v. State Tax Commission of Iowa, supra,* and *McLeod v. Dilworth Co.,* 322 U. S. 327, in which, from an examination of the appellate court opinions of Iowa and Arkansas, 233 Iowa 877 and 205 Arkansas 780, and the Supreme Court opinions in these cases, the method of doing business and the activity of the ex-state vendors in the taxing states seem to be identical.

In General Trading Company case the solicitation in the state was by traveling salesmen from Minnesota. The orders that were obtained were subject to acceptance or rejection at the vendor's office in Minnesota. The orders which were accepted were shipped F.O.B. the Minnesota office. In the instant case the Maryland purchasers are solicited by advertising matter sent through the mail. Obviously orders must be accepted at the Wilmington office of the defendant. In General Trading Company delivery was made by postal authorities and common carrier at the expense of the purchaser. In the instant case some deliveries are similarly made, *i.e.*, common carrier, at the expense of de-

fendant; most of the deliveries are made at the residence of the Maryland purchasers by the agent of defendant in its truck, which of course has to enter and use the facilities of Maryland to do so. There is, therefore, activity on the part of defendant in Maryland in the solicitation of orders and there is physical entrance into the state for the purpose of delivering the merchandise ordered. To require defendant to collect the use tax on such merchandise as it delivers in the state, either by its own vehicle or by engaging a common carrier at its expense, does not in my opinion unduly regulate or burden or discriminate against interstate commerce so as to make the Act invalid under the Commerce Clause.

In 1941 the cases of *Nelson v. Sears, Roebuck & Co.* and *Nelson v. Montgomery Ward & Co.*, 312 U. S. 359 and 373, were decided. The facts were substantially the same in the two cases. Each mail order house maintained stores and conducted business in Iowa. They disputed the constitutional right of Iowa to require it to collect a use tax with respect to merchandise ordered directly by residents of Iowa from out of state branches of the vendors, which orders were filled by direct shipments by mail or common carrier from the branches to the purchaser, it being admitted that such orders were not solicited or placed by any of the vendor's agents in Iowa. In sustaining the obligation of the vendors to collect the use tax for Iowa on such mail order business, the Court said:

> "Respondent, however, insists that the duty of tax collection placed on it constitutes a regulation of and substantial burden upon interstate commerce and results in an impairment of the free flow of such commerce. It points to the fact that in its mail order business it is in competition with out of state mail order houses which need not and do not collect the tax on their Iowa sales. But those other concerns are not doing business in the State as foreign corporations. Hence, unlike respondent, they are not receiving benefits from Iowa for which it has the power to exact a price. Respondent further stresses the cost to it of making these collections and its probable loss as a result of its inability to collect the tax on all sales. But

cost and inconvenience inhered in the same duty imposed on the foreign corporations in the *Monamotor* and *Felt & Tarrant* cases. And so far as assumed losses on tax collections are concerned, respondent is in no position to found a constitutional right on the practical opportunities for tax avoidance which its method of doing business affords Iowa residents, or to claim a constitutional immunity because it may elect to deliver the goods before the tax is paid.

"Prohibited discriminatory burdens on interstate commerce are not to be determined by abstractions. Particular facts of specific cases determine whether a given tax prohibitively discriminates against interstate commerce. Hence a review of prior adjudications based on widely disparate facts, howsoever embedded in general propositions, does not facilitate an answer to the present problem" (pp. 365-366).

After the Nelson cases the effort was made to distinguishing other use tax cases because of the difference in the method of conducting the business. These efforts were brushed aside by Mr. Justice Frankfurter speaking for the majority in the General Trading Company case, supra, pp. 337-339, as follows:

"We brought the case here, 320 U. S. 731, to meet the claim that there was need for further precision regarding the scope of our previous rulings on the power of States to levy use taxes. In view, however, of the clear understanding by the court below that the facts we have summarized bring the transaction within the taxing power of Iowa, there is little need for elaboration. We agree with the Iowa Supreme Court that *Felt & Tarrant Co. v. Gallagher*, 306 U. S. 62; *Nelson v. Sears, Roebuck & Co., supra;* and *Nelson v. Montgomery Ward & Co., supra*, are controlling. The *Gallagher* case is indistinguishable—certainly nothing can turn on the more elaborate arrangements for soliciting orders for an intricate machine for shipment from without a State as in the *Gallagher* case, compared with the comparatively simpler needs for soliciting business in this case. And

the fact that in the *Sears, Roebuck* and *Montgomery Ward* cases the interstate vendor also had retail stores in Iowa, whose sales were appropriately subjected to the sales tax, is constitutionally irrelevant to the right of Iowa sustained in those cases to exact a use tax from purchasers on mail order goods forwarded into Iowa from without the State. All these differentiations are without constitutional significance. Of course, no State can tax the privilege of doing interstate business. See *Western Live Stock v. Bureau*, 303 U. S. 250. That is within the protection of the Commerce Clause and subject to the power of Congress. On the other hand, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a State to the upkeep of which he may be asked to bear his fair share. But a fair share precludes legislation obviously hostile or practically discriminatory toward interstate commerce. See *Best & Co. v. Maxwell*, 311 U. S. 454.

"None of these infirmities affects the tax in this case any more than it did in the other cases with which it forms a group. The tax is what it professes to be—a nondiscriminatory excise laid on all personal property consumed in Iowa. The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate consumer—the Iowa resident who is paying taxes to sustain his own state government. To make the distributor the tax collector for the State is a familiar and sanctioned device. *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, 93-94; *Felt & Tarrant Co.* v. *Gallagher, supra.*"

The power of a state to require the ex-state distributor to collect the use tax as its agent was also sustained in *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, referred to therein as "a common and lawful arrangement"; *Felt & Tarrant* v. *Gallagher*, 306 U. S. 62; *McGoldrick* v. *Berwind-White*, *supra.*

Defendant denies the jurisdiction of Maryland over it on the ground that it must be found that defendant is engaged in business in Maryland, and a prerequisite to such finding is that its solicitation or deliveries in Maryland must be regular, continuous and persistent, which terms are used in *Nippert* v. *City of Richmond*, 327 U. S. 416, involving a municipal ordinance imposing a license tax on solicitors, which was held to violate the Commerce Clause. Whether either solicitation or deliveries are regular, continuous or persistent is necessarily relative, depending upon the particular business. No point to that effect was made in *General Trading Company*, and in the instant case the agreed facts do not show that there was not such an activity by defendant. According to the agreed facts, solicitation by mail occurred four times a year, while there are no details with respect to deliveries except the admitted fact that the deliveries by common carrier of merchandise sold for $1500 and by the company's own vehicle of merchandise sold for $8000 constitutes almost 80% of all tangible personal property sold during the period in question to residents of Maryland. I cannot find from the agreed facts, considering the nature of defendant's business, that its solicitations and deliveries in Maryland were not regular and continuous as opposed to casual and spasmodic. Indeed it is implied in *Nippert* v. *Richmond*, *supra*, page 426, that the making of delivery, if it consists of a course of business, may constitute "doing business" in the state.

4. I, therefore, conclude that the State has jurisdiction to require defendant to collect for it the use tax on tangible personal property which it delivers in Maryland by its own truck or by common carrier. I also conclude that the State has no jurisdiction over defendant with respect to such property purchased by Maryland residents at Wilmington and personally brought by such residents into Maryland. This question was mentioned but not decided in a foot note in *Nelson* v. *Montgomery Ward & Co.*, *supra*, page 374. The exact question was whether Montgomery Ward & Co., which qualified and was doing business in Iowa, could be required to collect the tax on sales made by its other stores located in other states near the Iowa border.

In the dissenting opinion of one judge of the Supreme Court of Iowa, 228 Iowa 1303, who took the same view as the Supreme Court of the United States as to the mail order sales, it was said that the imposition on the vendor of such "an almost impossible task" would be "a burden so unreasonable, arbitrary and capricious as to invade its constitutional rights under the due process clause of the Federal Constitution" and would, therefore, be invalid. I think the Maryland Act cannot reach such transactions because Maryland can not project its jurisdiction into another state, even though the latter is so near the Maryland border that some residents of the latter may circumvent the Use Tax Act.

The latter conclusion does not, however, affect the right of the State to recover the assessment against defendant on such sales which, according to the stipulation, amount to $2500 during the period in question. As the defendant has been found to be "engaged in business" within the meaning of the Act, the Comptroller had the legal right to make the deficiency assessment against it, and impose the interest and penalties that are included in the amount involved in the short note case. In the light of the conclusion defendant could have proceeded under the above mentioned Sections 287 and 288 of Article 81 to have this particular assessment revised. It, therefore, should have pursued the administrative remedies with respect to said item. Defendant elected to stand on what it considered its constitutional rights and defend against the effort to collect *any* of the claim from it. I think it had the right to do so, but, after it is found to be subject to the Act, it is too late to have the *amount* of its liability revised and redetermined. However, as this is in the nature of a test case, its future conduct can be governed accordingly.

A formal order may be presented for the entry of judgment in the short note case for the plaintiff for the amount of its claim with interest and costs.

S. RALPH WARNKEN.

APPENDIX "A"

II

OPINION OF THE COURT OF APPEALS OF MARYLAND, OCTOBER TERM, 1952—Filed March 11, 1953

No. 93

MILLER BROTHERS COMPANY

vs.

STATE OF MARYLAND

Two appeals in one record from the Superior Court of Baltimore City. S. Ralph Warnken, Judge.

Argued before Delaplaine, Collins and Henderson, JJ.

DELAPLAINE, *J.:*

These two appeals test the constitutionality of the Maryland Use Tax Act, Code 1951, art. 81, secs. 368-396, as applied to furniture sold by appellant, Miller Brothers Company, a Delaware corporation, at its store in Delaware and delivered to purchasers residing in Maryland.

The tax is an excise imposed by the Legislature on "the use, storage or consumption in this State of tangible personal property purchased from a vendor within or without this State * * * for use, storage or consumption within this State." The Act expressly provides in Sec. 369 that the tax shall be paid by the purchaser and shall be computed as follows: (a) on each sale where the price is from 51 cents to $1, both inclusive, 2 cents; (b) on each 50 cents of price or fraction thereof in excess of $1, 1 cent. The tax is paid by the purchaser to the vendor, as trustee for the State, and the vendor is liable for the collection for the State.

The State entered suit against appellant on March 19, 1952, to recover $356.40 assessed by the State Comptroller as deficiency in use tax in the period from July 1, 1947, to December 31, 1951. The State also filed a non-resident attachment suit against appellant and attached a station

wagon owned by it. Appellant, appearing specially, filed a petition to quash the writ of attachment on the ground that the assessment was unconstitutional. The State answered that appellant had neither applied for a revision of the assessment nor paid the tax and applied for a refund, and prayed that the petition to quash be dismissed because (1) the collection of use taxes may be contested only by the proceeding set forth in the statute, and (2) the assessment was authorized by statute and was constitutional.

In the short note case the Court entered judgment in favor of the State for $363, and in the attachment case it passed an order denying the petition to quash. We have been asked to review both the judgment and the order.

At the outset the State made the objection that if appellant desired to contest the assessment, it should have applied to the State Comptroller for a revision of the assessment; and that, having failed to do so, it was precluded from contesting it in the attachment case. It is entirely true that the courts do not favor the by-passing of administrative agencies, except where there is a clear necessity for a prior judicial decision. We have accordingly held that where a special form of remedy is provided by statute, the litigant should resort to that form rather than pursue other remedies, although where a constitutional issue is raised, and there is no danger of by-passing administrative action, the question may properly be decided in a suit for injunction or declaratory decree before the time has arrived for invoking the statutory remedy. Kahl vs. Consolidated Gas, Electric Light & Power Co., 191 Md. 249, 258, 60 A. 2d 754; Commissioners of Cambridge vs. Eastern Shore Public Service Co., 192 Md. 333, 64 A. 2d 151; Francis vs. MacGill, Md., 75 A. 2d 91; Kracke vs. Weinberg, Md., 79 A. 2d 387; Schneider vs. Pullen, Md., 81 A. 2d 226; Reiling vs. State Comptroller, Md., 94 A. 2d 261.

The Retail Sales Tax Act and the Use Tax Act provide that any taxpayer may apply to the Comptroller for revision of the tax assessed against him, and the Comptroller shall act promptly upon the application and notify the taxpayer of his action. Any taxpayer dissatisfied with the final determination of the Comptroller may appeal therefrom to the Circuit Court for the County in which the tax-

payer regularly conducts his business or to the Baltimore City Court if the taxpayer regularly conducts his business in Baltimore City. The taxpayer, or the Attorney-General on behalf of the State, or the Comptroller may, within 30 days from the final order entered by the Court, appeal to the Court of Appeals of Maryland, Code 1951, art. 81, secs. 347, 348, 394.

Appellant is a foreign corporation. It has never qualified or registered to do business in Maryland and has no resident agent in this State. It is engaged in the retail household furniture business. It has only one store, which is located in Wilmington. It does not maintain any office, branch store, warehouse or other place of business in Maryland. It has no salesman or other employee in Maryland. It does not maintain a mail-order business or accept orders by telephone, as most of the merchandise sold by it requires personal inspection and selection. It has, however, mailed from time to time advertising matter to its customers, including those who reside in Maryland. If merchandise purchased by a resident of Maryland is not taken away by the purchaser, the seller delivers it by its own motor vehicle or by common carrier. As appellant has not been regularly conducting its business in any County of the State or in Baltimore City, within the meaning of Section 348, it could not have followed the statutory procedure. Therefore, appellant was not precluded from challenging the validity of the assessment in the attachment case.

Appellant urged that it was not the intention of the Legislature to put the burden of collecting use taxes upon a foreign corporation which does not engage in any activity in Maryland except delivery of merchandise. It is true that even the solicitation of business in Maryland by an agent of a foreign corporation, without other substantial activities within the State, does not constitute "doing business" in the State within the meaning of the Foreign Corporation Law so as to subject itself to the State forum. Code 1951, art. 23, sec. 88; M. J. Grove Lime Co. vs. Wolfenden, 171 Md. 299, 303, 188 A. 794; Shaughnessy vs. Linguistic Society of America, Md., 84 A. 2d 68, 71. But here we are dealing with a statute which is far broader in its application.

Section 371 of the Act provides: "Every vendor engaging in business in this State and making sales of tangible personal property for use, storage or consumption in this State which are taxable under the provisions of this subtitle, at the time of making such sales, or if the use, storage or consumption is not then taxable hereunder, at the time when such use, storage or consumption becomes taxable hereunder, shall collect the tax imposed by this subtitle from the purchaser."

Section 368(k) defines the term "engaged in business in this State" as the selling or delivering in this State, or any activity in this State in connection with the selling or delivering in this State, of tangible personal property for use, storage or consumption within this State.

In view of this unusually broad definition of "engaged in business," we must hold that the statute is applicable to appellant, because it delivered merchandise to purchasers in Maryland.

We now consider the basic question whether the Maryland use tax infringes Article I, Section 8, of the Constitution of the United States, which vests in Congress the power to regulate commerce with foreign nations and among the several States. This provision of the Constitution was designed by the framers to eliminate the barriers which had been erected by the States to the freedom of movement across State borders. While the Constitution grants to Congress the power to regulate commerce among the States, it does not say what the States can do or cannot do in the absence of Congressional action. It may be generally stated, however, that while the Commerce Clause forbids a State to impose taxes directly on interstate commerce, it does not absolutely prevent the imposition of State taxes which, under certain circumstances, may have some incidental effect upon such commerce. The State cannot use its taxing or police power with the aim and effect of establishing an economic barrier against competition with the products of another State. The importer must be free from taxes which are imposed for the purpose of suppressing competition from outside the State and which lead to the suppression intended. It has been said that no formula can be devised for determining in all cases whether or not

a State tax is prohibited by the Commerce Clause, and that the question is inherently a practical one depending for its decision on the facts of each particular case. J. D. Adams Mfg. Co. vs. Storen, 304 U. S. 307, 58 S. Ct. 913, 9824, 82 L. Ed. 1365, 117 A. L. R. 429.

Taxes on sales of personal property have been upheld by the United States Supreme Court in decisions extending back to 1869, when the Court, speaking through Justice Miller in Woodruff vs. Parham, 8 Wall. 123, 19 L. Ed. 382, held that an ordinance of the City of Mobile, Alabama, authorizing the collection of a tax sales at auction was valid as applied to goods which were products of other States. Since that time the Court has uniformly sustained a tax imposed by the State of the buyer upon a sale of goods effected by delivery to the purchaser upon arrival at destination after an interstate journey. In referring to that ruling, Justice Stone said in McGoldrick vs. Berwind-White Coal Mining Co., 309 U. S. 33, 60 S. Ct. 388, 394, 395, 84 L. Ed. 565: "It has the support of reason and of a due regard for the just balance between national and state power. In sustaining these taxes on sales emphasis was placed on the circumstances that they were not so laid, measured or conditioned as to afford a means of obstruction to the commerce or of discrimination against it, and that the extension of the immunity of the commerce clause contended for would be at the expense of state taxing power by withholding from taxation property and transactions within the state without the gain of any needed protection to interstate commerce."

In Henneford vs. Silas Mason Co., 300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814, the Court held that in its application to machinery, materials and supplies purchased at retail in other States by contractors and brought into the State of Washington for use in construction, a State tax of 2 per cent of the purchase price, including the cost of transportation, for the privilege of using any article of tangible personal property within the State was not a tax on the operations of interstate commerce, but a tax on the privilege of use after such commerce was at an end, and therefore did not unlawfully burden interstate commerce. The Court explained that the right to use property is only one of the

privileges making up ownership, and the fact that the tax laid down the use of personal property purchased at retail, either within or without the State, was called an excise did not make the State's power to impose it less under the Commerce Clause than if it had been called a property tax.

In Pacific Telephone & Telegraph Co. vs. Gallagher, 306 U. S. 182, 59 S. Ct. 396, 83 L. Ed. 595, the Court held that a California use tax, imposing an excise on the consumer for the use, storage or consumption in California of tangible personal property purchased from any retailer, did not infringe the Commerce Clause in its application to equipment, materials and supplies purchased outside California by a California corporation operating a telephone and telegraph system in interstate and intrastate commerce and shipped to it in interstate commerce at various points within the State.

In Nelson vs. Sears, Roebuck & Co., 312 U. S. 359, 61 S. Ct. 586, 85 L. Ed. 888, the Court held that where a New York corporation was doing business in Iowa through its retail stores, the fact that a sale by one of its mail-order houses located outside Iowa to a customer within the State was made outside the State did not preclude application of the use tax thereto on the ground that the purchaser employed agencies of interstate commerce to effectuate the purchase.

In Nelson vs. Montgomery Ward & Co., 312 U. S. 373, 61 S. Ct. 593, 85 L. Ed. 897, the Court held that the Iowa Use Tax Act was not unconstitutional as applied to mail-order sales solicited by an Illinois corporation through advertising by its stores in Iowa, although the orders were sent to out-of-State mail-order houses and were filled by shipments to customers in Iowa, since the corporation could not thus escape the tax exacted by Iowa as a price of enjoying benefits flowing from its Iowa business.

In line with these decisions, we hold that the Maryland Use Tax Act, as applied to appellant's sales of furniture delivered to purchasers residing in Maryland, does not unlawfully interfere with interstate commerce. Of course, we recognize that the Commerce Clause prevents the State not only from enacting legislation that constitutes a direct bur-

den on interstate commerce, but also from imposing any heavier burden on products brought into the State from other States than it imposes upon similar products of their own territory. It is well established that a State tax on merchandise brought into the State from another State or upon its sales after it has reached its destination is lawful only when the tax is not discriminatory in its incidence against the merchandise because of its origin in another State. Sonneborn Bros. vs. Cureton, 262 U. S. 506, 43 S. Ct. 643, 646, 67 L. Ed. 1095; Baldwin vs. G. A. F. Seelig, Inc., 294 U. S. 511, 55 S. Ct. 497, 502, 79 L. Ed. 1032, 101 A. L. R. 55. However, a use tax statute, as applied to property purchased outside the State and brought into the State by the seller and used therein by the purchaser in conducting its business, is not discriminatory and hence does not offend the Commerce Clause where the tax is not exacted upon any article the sale or use of which has been subjected to a tax equal to or in excess of the challenged tax, whether under the laws of the State imposing the challenged tax or of any other State.

Appellant has failed to show that the Maryland use tax is discriminatory. This tax is complementary to the retail sales tax. Code 1951, art. 81, secs. 320-367. Section 370 of the Use Tax Act specifically exempts from the use tax all personal property upon which a retail sales tax has been paid to the State of Maryland. It is one of the functions of the integrated sales and use taxes to remove the temptation of buyers to place their orders in other States in the effort to escape payment of the tax on local sales. The fact that the buyer employs agencies of interstate commerce to effectuate his purchase is not material, since the tax is imposed on the privilege of use, storage or consumption of property after the commerce is ended. The statute taxes the use, storage or consumption of the property in the State of Maryland, regardless of the time when the tax is required to be paid.

The final contention is that the assessment violates the Due Process Clause of the Fourteenth Amendment of the Federal Constitution and also Article 23 of the Maryland Declaration of Rights, which declares that no man ought

to be "deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the Land." Appellant, appearing specially in the attachment case for the purpose of quashing the writ of attachment, sought to defend its interest in the attached motor vehicle without subjecting itself to the jurisdiction of the Superior Court.

Attachment proceedings, except those used as execution on judgment, are designed to accomplish two purposes: (1) to compel the appearance of the defendant to answer the plaintiff's demand, and (2) to give the plaintiff a security for the payment of his claim. This security is obtained at the commencement of the action by the seizure of the defendant's property. When the property is validly acquired, it is retained to await the result of the action, unless the defendant appears to the suit in the meantime and displaces the lien acquired under the attachment by substituting the security of a bond. If the defendant in a nonresident attachment suit appears, the proper course is to try the short note case against him before trying the attachment case. After the defendant has appeared and a verdict has been rendered in favor of the plaintiff in the short note case, the entry of a judgment *in personam* will not be arrested on account of the existence of any ground for quashing the attachment. Philbin vs. Thurn, 103 Md. 342, 63 A. 571.

Nevertheless, it is permissible for a defendant whose property has been attached to appear in the action solely for the purpose of protecting his property and without subjecting himself personally to the jurisdiction of the court, even though in order to protect his property he contests the validity of the plaintiff's claim. In such a case the court has jurisdiction over the property attached, but does not have jurisdiction over the person of the defendant. In support of this rule, the American Law Institute states: "If the court thereby acquires jurisdiction over him personally, in spite of his protestation that he does not intend to submit himself personally to the jurisdiction of the court, he has been placed in a difficult dilemma. He has been compelled either to lose his property, even though the claim against him is unfounded, or to submit himself personally

to the jurisdiction of the court which otherwise could have no power over him." Restatement Judgments, sec. 40.

But even acknowledging that appellant, a foreign corporation, was not subject to the State's jurisdiction, we hold that appellant may be held liable for the collection of the use tax from its Maryland customers. Appellant relied on two Mississippi decisions, Reichman-Crosby Co. vs. Stone, 204 Miss. 122, 37 So. 2d 22, and Stone vs. Reichman-Crosby Co., 43 So. 2d 184, holding that a nonresident seller engaged in interstate commerce is not subject to the State's jurisdiction and taxing power so as to be personally liable for failure to collect and pay a tax levied against citizens of Mississippi. We follow the decisions of the United States Supreme Court, rather than the Mississippi decisions.

In Felt & Tarrant Mfg. Co. vs. Gallagher, 306 U. S. 62, 59 S. Ct. 376, 83 L. Ed. 488, the Court held that the California Use Tax Act requiring retailers to collect the use tax from purchasers did not violate the Due Process Clause of the Fourteenth Amendment as applied to appellant, an Illinois corporation, which did not carry on any intrastate operations in California and was not subject to its jurisdiction, as against the argument that California lacked the power to require it to act as the State's collecting agent for the use tax and to insure payment of the tax if it failed to make collections from the tax debtors. Again in Southern Pacific Co. vs. Gallagher, 306 U. S. 167, 59 S. Ct. 389, 83 L. Ed. 586, the Court held that the California use tax, as applied to tangible personal property purchased outside the State by the railroad company and installed on importation or kept available for use as part of the transportation facilities, was not invalid as violating the Due Process Clause, since the taxable event was the exercise of property rights in California.

In General Trading Co. vs. State Tax Commission of Iowa, 322 U. S. 335, 64 S. Ct. 1028, 1029, 1030, 88 L. Ed. 1309, where a Minnesota seller had no office, branch, warehouse, or general agent in Iowa, but shipped goods from Minnesota to purchasers in Iowa, Justice Jackson, dissenting, said: "So we are holding that a state has power to make a tax collector of one whom it has no power to tax. Certainly no state has a constitutional warrant for making a tax col-

lector of one as the price of the privilege of doing interstate commerce. * * * The power of Iowa to enforce collection in other states is certainly very limited and the effort to do so on any wide scale is unlikely either to be systematically pursued or successfully executed."

While it may be true that the tax can be easily evaded, nevertheless the Court, speaking through Justice Frankfurter, said: "The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate consumer—the Iowa resident who is paying taxes to sustain his own state government. To make the distributor the tax collector for the State is a familiar and sanctioned device."

As we find no valid objection to the assessment, we affirm the judgment entered in the short note case in favor of the State and also the order in the attachment case denying appellant's petition to quash the attachment.

Judgment affirmed, with costs.

Order affirmed, with costs.

APPENDIX "B" *

Excerpts From Article 81 of the Annotated Code of Maryland (1951), Entitled "Revenue and Taxes", Sub-title "Maryland Use Tax".

"368. [*308*] (Definitions) As used in this sub-title, the following terms shall mean or include:

* * * * * * *

"(k) 'Engaged in business in this State' means the selling or delivering in this State, or any activity in this State in connection with the selling or delivering in this State, of tangible personal property for use, storage or consumption within this State. This term shall include, but shall not be limited to the following acts or methods of transacting business.

"(1) The maintaining, occupying or using, permanently or temporarily, directly or indirectly, or through a sub-

* The italicized section numbers in brackets are those of the 1947 Cumulative Supplement to the 1939 Code.

sidiary or agent, by whatever name called, of any office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business.

"(2) The having of any representative, agent, salesman, canvasser, or solicitor operating in this State for the purpose of selling, delivering, or the taking of orders for any tangible personal property."

* * * * * * *

"369. [*309*] (Imposition of tax). An excise tax is hereby levied and imposed on the use, storage or consumption in this State of tangible personal property purchased from a vendor within or without this State on or after the effective date of this Act, for use, storage or consumption within this State. The tax imposed by this section shall be paid by the purchaser and shall be computed as follows:

"(a) On each sale where the price is from fifty-one cents (51¢) to one Dollar ($1), both inclusive, two cents (2¢).

"(b) On each fifty cents (50¢) of price or fraction thereof in excess of One Dollar ($1), one cent (1¢)."

"Collection of Tax"

"371. [*311*] Every vendor engaging in business in this State and making sales of tangible personal property for use, storage or consumption in this State which are taxable under the provisions of this sub-title, at the time of making such sales, or if the use, storage or consumption is not then taxable hereunder, at the time when such use, storage or consumption becomes taxable hereunder, shall collect the tax imposed by this sub-title from the purchaser."

"373. [*313*] Every vendor required or permitted to collect the tax shall collect the tax imposed by the provision of this sub-title, notwithstanding the following:

"(a) That the purchaser's order or the contract of sale is delivered, mailed, or otherwise transmitted by the purchaser to the vendor at a point outside of this State as a result of solicitation by the vendor through the medium of a catalog or other written advertisement; or

"(b) That the purchaser's order or contract of sale made or closed by acceptance or approval outside of this State

or before said tangible personal property enters this State; or

"(c) That the purchaser's order or contract of sale provides that said property shall be, or it is in fact, procured or manufactured at a point outside of this State and shipped directly to the purchaser from the point of origin; or

"(d) That said property is mailed to the purchaser in this State from a point outside this State or delivered to a carrier at a point outside this State, F. O. B., or otherwise, and directed to the vendor in this State, regardless of whether the cost of transportation is paid by the vendor or by the purchaser; or

"(e) That said property is delivered directly to the purchaser at a point outside this State, if it is intended to be brought to this State for use, storage or consumption in this State."

"374. [*314*] The tax to be collected as provided in this sub-title shall be stated and charged separately from the sale price and shown separately from the sale price on any record thereof at the time when the sale is made or at the time when evidence of the sale is issued or employed by the vendor. The tax shall be paid by the purchaser to the vendor, as trustee for and on account of the State, and the vendor shall be liable for the collection thereof for and on account of the State."

"375. [*315*] The vendor and any other officer of any corporate vendor required or permitted to collect the tax imposed by this sub-title shall be personally liable for the tax collected, and such vendor shall have the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property and payable at the time of the sale. Any vendor who fails to collect the tax pursuant to this sub-title and the regulations prescribed hereunder shall, in addition to all other penalties, be personally liable to the State for the amount uncollected."

"376. [*316*] The tax hereby imposed shall apply and be collected by the vendor required or permitted to collect the tax imposed by this sub-title from the purchaser at the time the sale is made regardless of the time when the purchase

price is paid and delivered; unless the Comptroller shall provide by regulation in the case of credit or installment sales for the payment of the tax upon collection of the price or installments of the price or at some other time."

"379. [*319*] For the purpose of the proper administration of this sub-title and to prevent evasion of the tax and the duty to pay the same as herein imposed, it shall be presumed that the tangible personal property sold by any person for delivery in this State, however made or carried, is sold for use, storage or consumption in this State. A like presumption shall apply to all tangible personal property delivered without this State and brought into his State by the purchaser thereof. The presumption contained in this section may be overcome if the purchaser shall have in his possession a certificate, in such form as the Comptroller may prescribe, evidencing the fact that the tangible personal property was not sold for use, storage or consumption in his State as those terms are defined in Section 368 of this sub-title."

"Returns and Payment of Tax"

"380. [*320*] Before the fifteenth day of August, 1947, and before the fifteenth day of each calendar month thereafter, every vendor engaging in business in this State and every vendor not engaging in business in this State but who, upon application to the Comptroller, has been expressly authorized to collect the tax, shall make a return to the Comptroller, covering the preceding calendar month. The Comptroller may permit or require such returns to be made for other periods and upon such other dates as he may by regulation specify."

"381. [*321*] The form of returns required to be filed by Section 380 of this sub-title shall be prescribed by the Comptroller and shall contain such information as he may deem necessary for the proper administration of the tax. Such returns shall show, among other things the aggregate value of the tangible personal property sold by the vendor, the use, storage or consumption of which became subject to the tax imposed by this sub-title during the period of time covered by the return."

"382. [*322*] Before the fifteenth day of August, 1947, and before the fifteenth day of each calendar month there-

after, every person purchasing tangible personal property, the use, storage or consumption of which is subject to the tax imposed by this sub-title, and who has not paid the tax imposed by this sub-title to a vendor required or authorized to collect the same, shall make a return to the Comptroller covering the preceding calendar month. The Comptroller may permit or require such returns to be made for other periods and upon such other dates as he may by regulation specify. Such returns shall show the value of the tangible personal property purchased by such person, the use, storage or consumption of which became subject to the tax imposed by this sub-title during the period of time covered by the return."

"383. [*323*] At the time of filing the returns as specified in Section 380 and 382 of this sub-title, the vendor or person so filing said returns shall pay to the Comptroller the taxes imposed by Section 369 of this sub-title."

"384. [*324*] The vendor or person subject to tax as provided in this sub-title shall be entitled to apply and credit against the amount of tax payable by him as stated in Section 383, an amount equal to three per cent (3%) of the gross tax to be remitted to the Comptroller to cover the expense in the collection and remittance of said tax; provided, however, that nothing contained in this section shall apply to any vendor or person who shall fail or refuse to file his return with the Comptroller within the time prescribed by Sections 380 and 382 of this sub-title."

"386. [*327*] Where the Comptroller, in his discretion, deems it necessary to protect the revenues to be obtained under the provisions of this sub-title, he may require any taxpayer [to] file with him a bond issued by a surety company authorized to do business in this State and approved by the State Insurance Commissioner as to solvency and responsibility, in such amounts as the Comptroller may fix to secure the payment of any tax or penalties due or which may become due from such taxpayer. In the event that the Comptroller determines that a taxpayer is to file such a bond, he shall give notice to such taxpayer to that effect, specifying the amount of the bond required. The taxpayer shall file such bond within five (5) days after the giving of such notice unless within such five (5) days after the re-

quest in writing a hearing before the Comptroller, at which hearing the necessity, propriety and amount of the bond shall be determined by the Comptroller. Such determination by the Comptroller shall be final and shall be complied with within fifteen (15) days after the taxpayer is given notice thereof."

"Registration"

"390. [*331*] Every vendor engaged in business in this State except those registered under Section 356 of this Article, who shall sell or deliver tangible personal property for use, storage or consumption in this State shall obtain a license for the privilege of engaging in said business. Such person shall apply for the license required by this section within sixty (60) days from and after July 1, 1947."

"391. [*332*] Each applicant for a license required by Section 390 of this sub-title shall on or before the first day of August, 1947, make out and deliver to the Comptroller, upon a blank to be furnished by him for that purpose, a statement showing the name of the applicant, the name and addresses of all agents of the applicant operating within this State, the location of any and all distribution houses or other places of business of the applicant in this State, and such other information as the Comptroller may prescribe."

"392. [*333*] At the time of making his application as required by Section 391 of this sub-title, the applicant shall pay to the Comptroller a license fee in the sum of One Dollar ($1). Upon receipt of such application and the fee as herein prescribed, the Comptroller shall issue to the applicant a license authorizing the applicant to sell or deliver tangible personal property for use, storage, or consumption in this State. The license shall be non-transferrable except as otherwise provided in this sub-title and shall be displayed in the applicant's place of business. Except as otherwise provided in this sub-title, the license issued as herein provided shall continue valid until surrendered by the vendor or cancelled for cause by the Comptroller. The form of such license shall be as prescribed by the Comptroller."

"393. [*334*] Whoever engages in business in this State, except those registered under Section 355 of this Article,

who shall sell or deliver tangible personal property for use, storage or consumption in this State without having a license as provided in Section 390 of this sub-title shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than Twenty-five Dollars ($25.00) nor more than One Hundred Dollars ($100.00)."

"Applicability of Other Sections"

"394. [*335*] All provisions not inconsistent with the provisions of this sub-title in Sections 340 and 341 of this Article relating to failure to file returns and incorrect returns; in Sections 343-346, both inclusive, of this Article relating to refunds; in Sections 347 and 348 of this Article relating to revisions and * repeals; in Sections 353-355, both inclusive, of this Article relating to records, investigations and hearings; in Section 361 of this Article relating to general powers of the Comptroller; in Sections 363-364, both inclusive, relating to general provisions; in Section 365 of this Article relating to penalties; and in Section 366 of this Article relating to disposition of proceeds are hereby made a part of this sub-title and shall be applicable hereto."

Excerpts from Article 81 of the Annotated Code of Maryland (1951), entitled "Revenue and Taxes", sub-title "Retail Sales Tax Act".

"Failure to File Returns: Incorrect Returns"

"340. [*280*] (a) Whenever a taxpayer fails to file any return and/or pay the tax when due as required by this sub-title, there shall be assessed against him a penalty of ten percent (10%) of the tax due, plus interest at the rate of one-half of one percent (½ of 1%) per month or fraction of a month from the time the tax was due until paid.

"(b) If the failure to file any return is due to an attempt to defraud, then the penalty shall be, in lieu of the penalty more specifically provided for by sub-section (a) of this section, one hundred percent (100%) of the tax due, plus interest at the rate of one percent (1%) per month or fraction of a month from the time the tax was due until paid.

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* The word "appeals" evidently intended.

"(c) Any taxpayer who fails to file proper returns and pay the tax due with penalty and interest within ten (10) days of receiving notice from the Comptroller advising him of his delinquency, shall in addition to the foregoing penalty be assessed a penalty of twenty-five percent (25%) of the tax due.

"(d) When both vendor and purchaser are liable for any tax, a deficiency assessment shall be first levied against the vendor, but such assessment shall not be considered an election of remedies nor bar an assessment against the purchaser for the same tax or part thereof unpaid by the vendor.

"(e) All amounts received from any taxpayer shall be credited first to penalty and interest accrued and then to the tax due."

"Records; Investigations and Hearings"

"353. [*293*] (a) Each vendor shall keep complete and accurate records of all taxable sales, together with a record of the tax collected thereon, and shall keep all invoices, bills of lading and such other pertinent records and documents in such form as the Comptroller may, by regulation, require. Such records and other documents shall be open at any time during business hours for inspection and examination by the Comptroller or any of his authorized representatives and shall be preserved for a period of three (3) years unless the Comptroller shall in writing consent to their destruction within that period or by order require that they be kept longer.

"(b) Whenever any taxpayer fails to keep records from which the tax imposed by this subtitle may be accurately computed, the Comptroller may make use of a factor developed by surveying other taxpayers of the same type or otherwise compute the amount of tax due and this computation shall be prima facie correct."

"354. [*294*] (a) For the purpose of enforcing the provisions of this sub-title the Comptroller or any duly authorized agent or representative designated by him:

"(1) May conduct investigations and hold hearings concerning any matter covered by this sub-title at any time or place within the State of Maryland;

"(2) In the conduct of any investigation or hearing, may require by subpoena or summons the attendance and testimony of witnesses and the production of any books, accounts, records, papers and correspondence relating to any matter, which the Comptroller is authorized by this subtitle to determine;

"(3) May sign subpoenas, administer oaths and affirmations, examine witnesses and receive evidence.

"(b) In case of disobedience of any subpoena or the contumacy of any witness appearing before the Comptroller or his duly authorized agent or representative, the Comptroller may apply to the Circuit Court of any of the counties or to the Baltimore City Court for an Order. Such Court may thereupon issue an Order requiring the person subpoenaed to obey the subpoena or to give evidence or produce books, accounts, records, papers and correspondence touching the matter in question. Any failure to obey such order of Court, may be punished by such Court as a contempt thereof."

"Penalties"

"365. [*305*] Any taxpayer or any officer of a corporate taxpayer

"(a) who wilfully fails to collect the tax imposed by this sub-title in accordance herewith; or

"(b) who wilfully fails to pay over the tax imposed by this sub-title in accordance herewith; or

"(c) who wilfully fails to file any return required by this sub-title; or

"(d) who makes any wilfully false statement or misleading omission in any return pursuant to this sub-title; or

"(e) who wilfully fails to keep records in accordance with this sub-title and any regulations of the Comptroller pursuant hereto, shall be guilty of a misdemeanor and upon conviction shall be fined not more than One Thousand Dollars ($1,000.00) or imprisonment for not more than one year, or both."

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